IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 25.01.2019

JUDGMENT PRONOUNCED ON : 28.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

THE HONOURABLE MR. JUSTICE R. PONGIAPPAN

W.P.No.21001 of 2018

B.Usha .. Petitioner

Vs

1.The Principal Labour Judge,
Labour Court,
Vellore.

2.The Chief Administrative Officer,
Principal Labour Court,
Vellore.

3.The Accountant General,
Accountant General Office (A&E)
Teynampet,
Chennai -18. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution to issue a Writ of Certiorarified Mandamus or any other Writ or Order of similar nature calling for the records relating to the Recovery order passed by the first Respondent, dated 04.01.2018 and quash the same thereby directing the first Respondent to refund the attached amount of Rs.2,21,097/- deducted from the DCRG amount of Rs.5,96,453/- sanctioned by the third Respondent within a period of 2 months with admissible interest from the date of recovery till repayment.

For Petitioner : Mr.A.R.Nixon

For Respondents : Mr.B.Vijay for R1 and R2
Mr.Vijayshankar for R3

O R D E R

R.PONGIAPPAN,J.

The Petitioner has filed this Writ Petition, seeking for issuance of a Writ of Certiorarified Mandamus directing to call for the records relating to the Recovery Order passed by the Principal Labour Judge, Labour Court, Vellore, dated 04.01.2018 and to quash the same thereby, directing the First Respondent/ Principal Labour Judge, Vellore to refund the attached amount of Rs.2,21,097/- deducted from the DCRG amount of Rs.5,96,453/- sanctioned by the Third Respondent within a period of two months, with an admissible interest from the date of recovery, till the date of repayment and pass such other orders.

2. Heard, Mr.A.R.Nixon, the Learned Counsel for the Petitioner and Mr.B.Vijay, the Learned Counsel for the First and Second Respondents and Mr.Vijay Shankar, the Learned Counsel for the Third Respondent and perused the materials placed on record.

3. The Petitioner is a retired Deputy Nazir of Principal Labour Court, Vellore. She retired from service on 28.02.2018, after attaining the age of superannuation. In lieu of retirement, the First Respondent sent a proposal to the Third Respondent vide Letter in Dis.No.1198/2017 dated 05.12.2017, so as to get the Pension and other benefits of the Petitioner. The Third Respondent vide Letter No.Po2/10o221621/3/RO/22/625/30 dated 15.12.2017, before sanction of Pension and allied benefits, sent an Inadmissible Report to the First Respondent, which reads here under:-

> " The Grade Pay admissible to time scale of pay of Rs.4000-6000 is Rs.2800/-. In page 17 of Vol. II of SR (Service Register) it is noted that she is willing to repay the arrears of pay and allowances due to re-fixation of one Commission on 18.01.2007. But on page 31 of Vol.II of SR while fixing the pay due to 5% PP from 01.09.1998 she has been paid arrears till 18.01.2007. Hence pay has been fixed based on G.O.Ms.No.45 and G.O.Ms.No.237, from 01.01.2006. Pre-revised pay on 01.07.2017 works out to Rs.15,910/- + G.P.4800=19050/- Re fixation entry may be made in SR from 01.01.2006 till retirement". The objection has been raised 10 years after the fixation".

4. Based on the above Report of the Third Respondent, the First Respondent herein issued a proceedings vide in Dis.No.368 dated 17.01.2018, which is extracted below:

> a) Sanction of 5% PP from 01.09.1998 till 31.12.2005, in the post of Copyist and Typist of the Petitioner the alleged defect is of the year 20 years back.
>
> b) Revision of Pay notionally with effect from 01.01.2006 with monetary benefits

with effect from 01.01.2007, as per G.O.Ms.No.234 Finance (Pay Cell) Department, dated 01.06.2009. The incident is questioned 9 years after the Order.

C) Grant of Grade Pay of Rs.2,400/- in the time scale of Pay of Rs.5,200 – 20,200/- notionally with effect from 01.01.2006 with monetary benefit from 10.02.2011 as per G.O.Ms.No.45, dated 10.02.2011. The proceedings is after 11 years.

D) Grant of Grade Pay of Rs.2,800/- with effect from 02.04.2008 in the post of Assistant Scale of pay 5200-20200. The said proceedings is after 10 years.

E) Revision of Pay in the time scale of pay of Rs.9,300-34,800/- with Grade pay of Rs.4,800/- in the post of Head Clerk, Criminal Court, and Additional District Court, Tiruppattur.

F) Revision of pay with effect from 01.01.2016 notionally with Monetary benefit from 01.10.2017, as per G.O.Ms.No.303 Finance Pay Cell dated 11.10.2017 (present 7th Pay Commission. The fixation is made only after VII Pay Commission. The right accrued naturally.

In the last para of the proceedings, it has been noted as follows:

"Therefore, if the Pay of the Petitioner has been revised with effect from 01.09.1998 i.e. 20 years prior to the date of retirement as stated supra and in consequence her pay last drawn has been fixed at Rs.54,100/- as stated supra and as pointed out by the Third Respondent, arrears of pay and allowances, if any with effect from 01.09.1998 to till date to be drawn and recovery if any also be recovered in two installments from January 2018 and February 2018".

5. The said proceedings were served on the Petitioner only on 05.04.2018, after the date of retirement i.e., 28.02.2018. The Third Respondent in his proceedings did not ask the First Respondent/Labour Court to effect recovery, if any excess pay found to have been paid, subsequent to the re-fixation. But, the First Respondent arbitrarily without any authority ordered for recovery in two installments from January 2018 and February 2018.

6. After drawing the above proceedings, the First

Respondent/ Accountant General re-transmitted the Pension proposals of the Petitioner to the Third Respondent and subsequently, the Third Respondent was sanctioned the Pension and other Pensionary benefits to the Petitioner vide his Authorization Letter No.Po2/10221621/3/PPO No.RO 221621/Judl. dated 25.01.2018. In the Authorization issued by the Third Respondent, he was not mentioned about any recovery in respect to the alleged excess payment if any found due to re-fixation. In his Authorization, the Third Respondent sanctioned Pension amount of Rs.18,935/-. Besides Pension, Commutation amount of Rs.6,33,953/- and DCRG amount of Rs.5,96,453/- were also sanctioned.

7. After receipt of a copy of the Authorization for Pension and other benefits, the Petitioner met the Second Respondent and requested for payment of the DCRG amount through Bank transaction. The Second Respondent has informed that recovery to the tune of nearly Rs.2,00,000/- would be effected in the Petitioner's DCRG and only after effecting recovery, remaining DCRG would be paid to the Petitioner. Before, such recovery was made, the Petitioner must have given an opportunity. The Petitioner sent a representation dated 09.04.2018, requesting the First Respondent not to recover any amount in her DCRG payment. Further, the Petitioner wanted a detailed letter from the First Respondent regarding reasons for recovery, the quantum of recovery and the authority for such recovery.

8. According to Rule 44(4)(1) of Tamil Nadu Pension Rules, 1978, if the excess payment made to a Pensioner, even if the same is due to wrong fixation of pay contrary to the above Rules, the whole liability have to be born by the authority, who wrongly fixed the pay. Further more, the Petitioner brought to the notice of the first Respondent that recovery from a Government employee by the employer is not permissible. The First Respondent bluntly rejected the representation of the Petitioner, without assigning any reason. The Respondent is ought to have made a ''Speaking order'' for rejecting the representation of the Petitioner.

9. Subsequently, the First Respondent through a Bill dated 06.04.2018, drawn only Rs.3,75,356/- as DCRG, after a recovery of Rs.2,21,097/-, out of sanctioned amount of DCRG of Rs.5,96,453/-. Such action of the First Respondent in recovering from the DCRG of the Petitioner is arbitrary, irrational, contrary to statutory provisions of Pension Rules.

10. Resisting the claim made by the Petitioner, the First and Second Respondents by filing counter, have stated that after receiving the Pension proposal in respect to the Petitioner, the Third Respondent/Accountant General returned the same with the following remarks:-

"Grade pay admissible to time scale of pay of Rs.4,000- 6,000/-is Rs.2,800/-(Restricted to the first level of promotion). In page 17, Volume.II of SR, it is noted that she is willing to repay the arrears of pay and allowance due to re-fixation of one commission on 18.01.2007. But on page 31 Vol.II of SR while fixing the pay due to 5% PP from 01.09.1998 she has been paid arrears till 18.01.2007. Hence, pay has been fixed based on G.O.Ms.No.45 and G.O.Ms.No.237, from 01.01.2006. Pay Last Drawn in Pre revised pay on 01.07.2017 works out to Rs.15,910/- + 4,800. Refixation entry may be made in Service Register from 01.01.2006 till retirement".

11. Further, it was stated that based on the Admissibility Report of the Accountant General, Chennai dated 15.12.2017, the pay of the Writ Petitioner has been re-fixed as per the Proceedings of the Presiding Officer, Principal Labour Court, Vellore vide Dis.No.52/2018 dated 17.01.2018. According to the calculation arrived at by the Third Respondent, the eligible Last Pay Drawn of the Petitioner was Rs.54,100/-, by restricting the pay of the Writ Petitioner.

12. The Writ Petitioner moved to the post of Selection Grade Typist with effect from 18.01.2017 as per the Proceedings of the Principal District Judge, Vellore, vide Dic.No.6055/2007 dated 25.06.2007. With regard to Selection Grade, the Government of Tamilnadu have issued clarification vide in Letter No.63305/Pay Cell/2010-1 dated 08.11.2010, which reads as under:-

" However, in the revised pay structure employees who were awarded selection grade/special grade prior to 01.01.2006 in the pre-revised scales of pay were granted due protection by allowing them to move to the corresponding revised pay scales by virtue of higher pre-revised pay scales drawn by them. Further, in case of employees awarded selection grade/special grade between 01.01.2006 and 31.05.2009 i.e., prior to the issue of G.O.234, Finance Department (PC) dated 01.06.2009. They were also allowed the same benefit as that of the employees who were awarded selection grade/special grade prior to 01.01.2006."

13. Further, it was observed that a Selection Grade/ Special Grades of pay should be restricted to the level of their First level and Second level posts respectively. Moreover, after 01.06.2009, the employees moving to Selection Grade/Special Grade are entitled to one increment i.e., 3% of basic pay + Grade Pay on the date of Award of Selection Grade. While fixing the said pay structure, the Writ Petitioner without following the guidelines issued in the Government Letter dated 08.11.2010,

she herself erroneously fixed her pay as per the order passed in Dis.No.3298/2013 dated 06.11.2013 of the Judicial Magistrate No.II, Tirupattur, by giving misrepresentation while, she was officiating the post of Head Ministerial Officer of Judicial Magistrate Court No.II, Tirupattur at Rs.13,500/- in the time scale of Rs.9,300 - 34,800/- + GP 4,200/- with effect from 18.01.2007. In the Government letter dated 08.11.2010, it was clearly mentioned that the pay of the Typist/Junior Assistant shall be fixed in the First Level promotion i.e., in the time scale of Rs.5200-20200+GP2800/- (Rs.4000-100-6000/-), which was restricted in the Government letter.

14. But, the Writ Petitioner herself erroneously fixed her pay by giving misrepresentation to the Pay Drawing Officer i.e., the Judicial Magistrate No.II, Tirupattur in the time scale of pay of Rs.9300-34800+GP 4200/- to move Selection Grade post of Typist with effect from 18.01.2007, instead of First Level promotion i.e., in the time scale of Rs.5200-20200 + GP 2800/-. Only for the said reason, the office of the Third Respondent restricted the pay of the Writ Petitioner to the First Level promotion. So also in view of the Admissibility Report of the Third Respondent dated 15.12.2017, the First Respondent issued a Proceedings for recovering the excess amount drawn by the Petitioner. Further, in view of Article 56 of the Tamilnadu Financial Code, Volume-I, the Pay Drawing Officer was held responsible to take all possible action to recover the over payment made to the Government servant. It shall be the duty of every retired Government Servant to clear all Government dues before the date of their retirement. According to Rule 70 of Tamilnadu Pension Rules, 1978 and Article 56 of the Tamilnadu Financial Code, Volume I, the over payment of pay and allowances drawn and paid to the Writ Petitioner has been recovered from the Gratuity of the individual. In respect to the Second Respondent, who was the then Chief Administrative Officer has no right to recover the over payment. He was doing his duty as directed by the Pay Drawing Officer. Hence, the Second Respondent is not a necessary party to this writ petition. Even though, the Writ Petitioner has submitted a representation dated 09.04.2018 requesting not to effect the recovery of excess payment, the said request of the Petitioner is against the provisions of Law and straight away, the same was dismissed by the Pay Drawing Officer.

15. In view of the fore going ascribed reasons, the First Respondent is the competent authority to recover the excess payment made to the Petitioner. In respect to the Third Respondent, it is observed in his counter affidavit that the Grade Pay admissible to the time scale of Rs.4000 - 6000 is Rs.2800/-. The Third Respondent arrived at the Pay Last Drawn at Rs.54,100/- and authorized the Pensionary benefits on that basis

on 15.12.2017 under PPo No.R 0221621. In pursuant to the above order, it is seen that only the Departmental Authority, who is the First Respondent herein has issued a recovery order. More than that in the Service Register of the Petitioner, in page no.17 of Vol-II, the Petitioner has given consent to repay the excess paid pay and allowances due to re-fixation. Further, alongwith the application for Pension, the Petitioner has given a Declaration dated 30.11.2017, whereby, she has undertaken to make good any loss caused to the Government by way of any overdrawal of pay, allowances etc. As per note 1 below Rule 70, ''ascertainable Government dues'' includes over payment of Pay and Allowances, balances of Housing Building or Conveyance Advance, Arrears of Rent and other charges and Arrears of Income Tax deductable at source, etc. Therefore, deducting over payment of pay and allowances from the Gratuity of the petitioner is in order and the Writ Petition filed by the petitioner is liable for dismissal.

16. The Learned Counsel for the Petitioner would contend that the pay of the Petitioner was not fixed by herself. At the time, when she was working as a Head Ministerial Officer at Tirupattur, the Pay Drawing Officer of the Petitioner was Judicial Magistrate II. In the said circumstances, it cannot be concluded that the Petitioner herself misrepresented before the Magistrate and fixed her salary over and above the Grade Pay, she is eligible.

17. The Learned Counsel for the Petitioner has drawn the attention of this Court to the Judgment of our Hon'ble Apex Court reported in 2015 (4) SCC 334 in the case of State of Punjab and Others Vs. Rafiq Masih(White Washer) and Others and submits that after the retirement, the employer is not entitled to recover the excess payment. Accordingly, he prayed to allow this Writ Petition.

18. On the other hand, Mr.B.Vijay, the Learned Counsel for the Respondents 1 & 2 submits that at the time of fixing wrong pay, the Petitioner alone made entries in her Service Register and obtained the signature from the Pay Drawing Officer. It cannot be held that the said entry was made apart from the knowledge of the Petitioner. Thereby, the Petitioner had only committed a mistake and fixed the excess pay, despite the actual pay, to which she was eligible.

19. Mr.Vijay Shankar, the Learned Counsel for the Third Respondent has categorically submitted that the First Respondent/Labour Court had passed an order of recovery only based on the Admissibility Report issued by the Third Respondent/Accountant General.

20. The Learned counsel appearing for the Respondents has also placed reliance on the judgment of our Hon'ble Apex Court reported in AIR 2012 SC 2951 in the case of Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, wherein, in Paragraph nos.16 & 17, which reads as under:

> ''16.We are concerned with the excess payment of public money which is often described as ''tax payers money'' which belongs neither to the officers who have effected over -payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government Officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc, because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.
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> 17.We are, therefore, of the considered view that except few instances pointed out in Syed Afbdul Qadir case(2009 AIR SCW 1871) (supra) and in Col.B.J.Akkara (Retd.) case (2006 AIR SCW 5252) (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.''

21. By applying Article 142 of the Constitution of India, to the above said judgment reported in 2015 (4) SCC 334 (cited supra), the Hon'ble Apex Court made an observation that recovery cannot be treated as a binding precedent. It has to be confined to the peculiar facts of that case.

22. Further, in the decision of the Hon'ble Supreme Court in Indian Bank Vs. ABS Marine Products Private Limited, AIR 2006 SC

1899, it is observed and held that ''Courts should be careful to ascertain and follow the Ratio Decidendi and not the relief given on special facts, exercising power under Article 142 of the Constitution of India. Indeed, any sum received without an authority of Law can be recovered from the concerned person because of the simple fact that law enjoins an implied obligation on the part of the recipient to repay the money. Otherwise, it is a clean case of unlawful gain/unjust enrichment, as the case may be.

23. At the same time, it is the contention of the Learned Counsel for the First and Second Respondents that at the time of wrong fixation of salary, the Petitioner was working as a Head Ministerial Officer at Judicial Magistrate II, Tirupattur. The said fact was not disputed on the side of the Petitioner. In common, in all Magistrate Courts, the Head Ministerial Officer is the Next Officer to the Presiding Officer. He only maintains the Service Register of all the employees working in the above said Court. The Head Ministerial Officer can only prepare Pay Bill and put to his counter signature before getting approval from the Pay Drawing Officer, who is the Judicial Magistrate. In this case, the alleged occurrence happened only at the time, when the Petitioner was working as a Head Ministerial Officer at Tirupattur. After the retirement, now, the Petitioner contended that the said error was committed out of her knowledge. The said submission of the Petitioner is not having any merit and without showing the relevant documents, this Court is not inclined to accept the contention raised by the Petitioner straight away.

24. In fact, in the Government Order vide in G.O.Ms.No.286, Finance (Pension) Department dated 28.08.2018 passed by the Government of Tamilnadu, it is seen that based on the judgment of our Hon'ble Apex Court, issued a clarification in respect to the mode of recovery, as already pointed out by the Learned counsel for the Petitioner. Further, in the said Government Order, the responsibility was fixed on the Officer attributable to the Bill Passing Authority and ordered to recover the loss from the said Officers. But, in the case on hand, as already discussed, an error was committed only by the Writ Petitioner and not by the act of the other Officers. Further, as per the case of the Petitioner, the excess amount was recovered from the DCRG, to which she is entitled to receive.

25. In this aspect, it is relevant and useful to refer Rule 70 of the Tamilnadu Pension Rules, 1978 which reads as under:-

> ''70.Recovery and adjustment of Government dues:-(1) It shall be the duty of

every retiring Government servant to clear all Government dues before the date of his retirement.

(2) Where a retiring Government servant does not clear the Government dues and such dues as ascertainable

(a) an equivalent cash deposit may be taken from him, or

(b) out of the gratuity payable to him an amount equal to that recoverable on account of ascertainable Government dues shall be deducted there from.

26. So also the above said provision is very clear that the ascertainable Government dues includes ''Over payment of Pay and Allowances''. Accordingly, the First Respondent is having the power to recover the ''Over payment''. Further, the said excess payment was recovered, only at the time of giving the Pension benefits to the Petitioner. Hence, it cannot be said that the recovery order was made after a long gap of time. More than that, as indicated by the Third Respondent, in the Service Register maintained by the officer of the employer, pertaining to the Petitioner, it was clearly held that the Petitioner gave an undertaking in respect to the recovery of over payment. After, giving assurance for recovering the over payment, now, the Petitioner filed the present Writ Petition and prayed for allowing the same, in order to waive the over payment, which was received nearly for the past 10 years. So also, the prayer sought for by the Petitioner in this Writ Petition is not based on any sound legal principle.

27. Accordingly, for the above said reasons, this Writ Petition stands dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The Principal Labour Judge,
Labour Court,
Vellore.

2.The Chief Administrative Officer,
Principal Labour Court,
Vellore.

3.The Accountant General,
Accountant General Office (A&E)
Teynampet,
Chennai -18.

+1 cc to M/s.A.R.Nixon, Advocate Sr.No.18718
+1 cc to M/s.V.Vijay Shankar, Advocate Sr.No.1990

W.P.No.21001 of 2018

RK(CO)
CSL/05.04.2019